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U.S. Citizenship
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Services

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FILE: EAC 02 217 52969 Office: VERMONT SERVICE CENTER

Date: FEB 3 2004

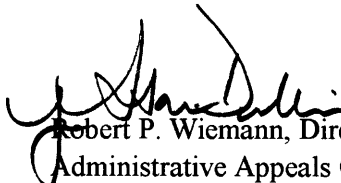
IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded for further action.

The petitioner is a hospital that seeks to employ the beneficiary as a research fellow. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition because he found the beneficiary not qualified to perform the duties of a research fellow. On appeal, counsel submits a brief and other documentation.

The record of proceeding before the AAO contains, in part: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a research fellow. The petitioner indicated that it wished to hire the beneficiary because he possessed a medical degree as well as experience in the specialty of orthopaedics.

The director determined that the beneficiary was not qualified for the proffered position because the beneficiary had not passed part 3 of the United States Medical Licensing Examinations (USMLE). The director found that the beneficiary was subject to 8 C.F.R. § 214.2(h)(4)(viii)(B), which provides that:

A petitioner seeking to have a physician who graduated from a medical school in a foreign state classified under section 101(a)(15)(H)(i) of the Act must establish that the beneficiary is:

(1) coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research; or

(2) the alien has passed the Federation Licensing Examination (or an equivalent examination as determined by the Secretary of Health and Human Services); and

(i) has competency in oral and written English which shall be demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical graduates; or

(ii) is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

The director noted that since the proffered position includes patient care, the beneficiary would need to fulfill the examination requirements listed under the second criterion above. The director also found that the position is unquestionably a specialty occupation, and the beneficiary is otherwise qualified to perform the duties of the specialty occupation.

On appeal, counsel states that the beneficiary is exempt from the examination requirements. Counsel notes

that if it can be established that the beneficiary is a physician of national or international renown, pursuant to 8 CFR § 214.2(h)(4)(viii)(C), he would be exempt from the examination requirement described above. Counsel asserts that the beneficiary is a physician of national or international renown; thus, he does not need to complete the examination process. The record contains numerous documents attesting to the beneficiary's expertise in his field of medicine. The director found these to be insufficient to demonstrate national or international renown. It is not clear from the record, however, that it was necessary to reach this stage of analysis of the beneficiary's qualifications.

The first criterion in the above-mentioned section requires the petitioner to demonstrate that the beneficiary is coming primarily to conduct research and/or teach, and that "no patient care will be performed, except that which is incidental to the physician's teaching or research." The second criterion, which the director applied in this case, is an alternative to the first. The record is unclear regarding the specific duties of the proffered position, and it does not explain the nature of the beneficiary's patient contact. It cannot be determined from the record that the beneficiary's duties would entail patient care beyond that which is required by his teaching or research. If the petitioner establishes that the proposed duties fit within the parameters set by 8 C.F.R. § 214.2(h)(4)(viii)(B)(1), then the issues of the USMLE completion or the beneficiary's level of renown need not be addressed.

The director will need to determine whether the responsibilities of the proffered position include patient care beyond that which is incidental to the teaching and research duties, and whether the beneficiary qualifies to perform services in the specialty occupation. Accordingly, the matter will be remanded to make such a determination and to review all relevant issues. The director may request additional evidence that is deemed necessary. The petitioner may also provide additional documentation within a reasonable period to be determined by the director. Upon receipt of all evidence and representations, the director shall enter a new decision.

ORDER: The decision of the director is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.